IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.566 OF 2006

Mohammed Yasin Usmani .. Petitioner

Versus

Nissar Ahmed Usmani .. Respondent

Mr.S.S.Jain for petitioner

Mr.A.S.Uraizee with ms.Shafaq Uraizee &

M.V.Singh for respondent.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 7th February 2006.

P.C.

. Heard Mr.Jain for petitioner and Mr.Uraizee for respondent. Rule. By consent,

Rule is made returnable forthwith.

2. Petitioner who is original plaintiff before the City Civil Court in Suit No.1089 of 1985 has filed the instant petition challenging the order passed by the City Civil Court on Chamber Summons No.1377 of 2005 taken out in the above suit.

3. The chamber summons was for amendment of plaint. By the order under challenge delivered on 5th December 2005, learned Judge rejected the application for amendment essentially on the ground that it is delayed and it changes the original nature of the suit.

4. With the assistance of learned Counsel appearing for both sides, I have perused the plaint as also the application for amendment. In the application for amendment which was supported by an affidavit, petitioner original plaintiff

has specifically averred that during the course of the testimony of PW 2 recorded on 18th June 2005, that the petitioner became aware of an order passed in 1989 transferring the suit premises in the name of defendant and his family members. It is pointed out that during the course of the evidence of P.W.2, with regard to census record of suit premises, recorded on 18th June 2005, for the first time plaintiff discovered this fact and it is this event which is sought to be brought on record. It is pointed out that no other amendment except incorporating this event and pleas and relief based thereon is sought by the petitioner.

5. Application was contested by the defendant and he pointed out that an order passed on 7th April 1989 was in fact to the knowledge of the petitioner plaintiff and it is after a delay of 16 years that the said fact is sought to be placed on record. There cannot be any relief

based on such a plea as the same is clearly time barred.

6. In my view, the court below was in obvious error in rejecting this application for amendment. The suit is filed by the petitioner plaintiff for mandatory injunction directing the respondent, his servants and agents to remove themselves from the suit premises which are more particularly described in para 22(a) and vide para 22(b) a decree for possession is claimed. If during the pendency of such a dispute which is essentially claiming title in the suit premises, if the petitioner acquires knowledge of an alleged transfer of the suit premises in favour of respondent orig. defendant, then merely because it is sought to be placed on record during the course of trial, is no reason to straight away reject the application for amendment. More so, when the petitioner plaintiff has satisfied the trial court in terms

of proviso to Order VI Rule 17 of C.P.C. as amended. The Court below in para 5 of the impugned order acknowledges this fact when it observes that even if it is assumed that petitioner came to know of the above transfer after examining P.W.2, there is still five months delay. In my view, for such a delay respondent - defendant should have been adequately compensated by payment of cost. It is difficult to sustain the observation and finding that original nature of suit undergoes a change merely because petitioner seeks to incorporate pleas pertaining to transfer of suit premises, after the suit was filed. The nature of pleas raised and the relief claimed remains the same. It is only that, alternatively, the petitioner - plaintiff claims that if the transfer order is illegal, then, the respondent defendant would acquire no title in the suit premises based thereon. As to how this changes nature of the suit for possession on title is not clear to me at all.

7. Consequently, the order under challenge cannot be sustained. It is set aside. Rule is made absolute in termsof prayer clause (a). Chamber summons is allowed in terms of prayer clause (a). Amendments to be carried out within three weeks from today. Petitioner to pay cost quantified at Rs.2500/- to respondent - defendant. Cost condition precedent. Upon amended plaint being served, respondent defendant is at liberty to file additional written statement within four weeks from the date of receipt of a copy thereof. Needless to observe that all contentions on merits of both sides are kept upon and the trial court shall consider them including the plea of limitation and time bar raised by respondent at an appropriate stage.

(S.C.DHARMADHIKARI, J)